SAMPO MATERIALS (M) SDN BHD v. TENAGA NASIONAL BHD

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
ALIZATUL KHAIR OSMAN JCA
MAH WENG KWAI JCA
[CIVIL APPEAL NO: N-02-1527-2011]
5 OCTOBER 2015

UTILITIES: *Electricity – Consumption and usage – Claim for undercharged bill due to defect in meter system – Whether claim time-barred – Whether claim proven – Whether basis of calculations proven – Whether plaintiff discharged burden of proving claim*

LIMITATION: *Accrual of cause of action – Computation of limitation period – Claim for undercharged electricity bill due to defect in meter system – Claim founded on agreement – Time when shortfall first recovered – Whether when shortfall incurred – Whether claim barred by limitation – Limitation Act 1953, s. 6(1)(a)*

EVIDENCE: *Documentary evidence – Admissibility of – Claim for undercharged electricity bill due to defect in meter system – Whether basis of calculations proven – Whether content of documents relied on to arrive at outstanding sum properly proven – Whether makers of documents called – Whether documents admissible – Evidence Act 1950, s. 73A*

The respondent ('plaintiff'), *vide* an Electricity Power Supply Agreement ('the agreement'), supplied electricity to the appellant ('defendant') and the latter agreed to pay for the supply of electricity. Due to a defect in the meter system, the plaintiff claimed against the defendant for an undercharged bill of electricity consumption which it alleged failed to be recorded accurately and/or correctly for the period between 20 December 2000 until 15 December 2002 amounting to the sum of RM340,002.72. The High Court Judge allowed the plaintiff's claim and hence, the appeal by the defendant. The issues raised for the court's determination were, *inter alia*: (i) whether the plaintiff's claim was barred by limitation; and (ii) whether the plaintiff had proven its claim. It was the defendant's contention that the plaintiff's claim was filed out of time as it was filed six years and four months after the plaintiff's cause of action purportedly accrued on 20 December 2000 and the writ of summons was only filed on 6 April 2007. The defendant also contended that the plaintiff had failed to prove the shortfall of RM340,002.72 by failing to call the maker of the graph ('P6') and the debit note ('P4'), the two documents relied on by the plaintiff to arrive at the figure.

Held (allowing appeal)
Per Alizatul Khair Osman JCA delivering the judgment of the court:

(1) The plaintiff's claim was founded on the agreement and therefore, the relevant provision governing the period of limitation in respect of the cause of action would be s. 6(1)(a) of the Limitation Act 1953 ('the Act'). The outstanding bill in the present case was calculated from 20 December 2000 and it was therefore the date when the shortfall occurred. Thus, although the shortfall was discovered on 17 November 2002, the plaintiff's cause of action would have accrued on 20 December 2000 as by that date the plaintiff had a right, *albeit* undiscovered, to the shortfall. Consequently, the plaintiff's claim was caught by limitation by virtue of s. 6(1)(a) of the Act. (paras 16-18 & 27-28)

(2) The plaintiff's claim was hinged primarily by exhs. P4 and P6 to arrive at the outstanding sum of RM340,002.72. However, the maker of P4, and Puan Sarojini, who prepared the figures in P6 were not called. The mere fact that a document is marked as an exhibit does not render the documents admissible until the content is properly proven. The failure of the plaintiff to call the makers of the documents rendered them inadmissible as they had not fulfilled the best evidence rule required under s. 73A of the Evidence Act 1950 ('EA'). The plaintiff had also failed to adduce any evidence to show that the maker of P6 and Puan Sarojini were dead, unfit by reason of their bodily or mental condition, were overseas or that all efforts to find them had been made without success in order to absolve them from the strict requirements of s. 73A of the EA. Exhibits P6 and P4 were therefore clearly inadmissible. (paras 53, 60-64, 68 & 69)

(3) The evidence of SP1 and SP3, who testified for the plaintiff, were merely hearsay as the veracity of the documents, which SP1 and SP3 were seeking to establish, could not be ascertained without the makers being cross-examined. The amount of RM340,002.72 was not reflected in P4 and, aside from explanation of SP1, there was no evidence adduced to show the basis of calculations and how the sum was arrived at. The plaintiff had thus failed on a balance of probabilities to discharge its burden of proving its claim. Hence, the trial judge was plainly wrong in accepting the RM340,002.72 as the correct calculation when there was no evidence in support of the finding. (paras 69-72 & 74)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('plaintif') melalui satu Perjanjian Bekalan Kuasa Elektrik ('perjanjian') membekalkan bekalan elektik kepada perayu ('defendan') dan defenden telah bersetuju untuk membayar bagi bekalan elektrik tersebut. Disebabkan kerosakan pada sistem meter, plaintif menuntut terhadap defendan satu bil bagi penggunaan elektik yang dikurang caj yang mana

didakwa gagal direkodkan dengan tepat dan/atau dengan betul bagi tempoh 20 Disember 2000 hingga 15 Disember 2002 yang berjumlah RM340,002.72. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif dan lantaran itu, rayuan ini oleh defendan. Isu-isu yang dibangkitkan untuk penentuan mahkamah adalah, antara lain: (i) sama ada tuntutan plaintif telah terhalang oleh had masa; dan (ii) sama ada plaintif telah membuktikan tuntutannya. Defendan menghujahkan bahawa tuntutan plaintif telah difailkan di luar masa kerana difailkan enam tahun dan empat bulan selepas kausa tindakan plaintif dikatakan terakru pada 20 Disember 2000 dan writ saman hanya difailkan pada 6 April 2007. Defendan juga menegaskan bahawa plaintif gagal untuk membuktikan kurangan RM340,002.72 dengan kegagalan memanggil pembuat graf ('P6') dan nota debit ('P4'), kedua-dua dokumen yang disandari oleh plaintif untuk mencapai jumlah tersebut.

Diputuskan (membenarkan rayuan)
Oleh Alizatul Khair Osman HMR menyampaikan kehakiman mahkamah:

(1) Tuntutan plaintif adalah berdasarkan pada perjanjian dan oleh itu peruntukan relevan yang berkaitan dengan tempoh had masa berkenaan dengan kausa tindakan termaktub dalam s. 6(1)(a) Akta Had Masa 1953 ('Akta'). Bil yang belum dijelaskan dalam kes ini dikira dari 20 Disember 2000 dan dengan itu tarikh apabila kurangan tersebut berlaku. Maka, walaupun kurangan diketahui pada 17 November 2002, kuasa tindakan plaintif sepatutnya terakru pada 20 Disember 2000 kerana pada tarikh tersebut plaintif mempunyai hak meskipun tidak mengetahui akan kurangan tersebut. Oleh yang demikian, tuntutan plaintif dirangkum oleh had masa menurut s. 6(1)(a) Akta.

(2) Tuntutan plaintif pada awalnya bergantung pada eks. P4 dan P6 untuk mencapai jumlah yang belum dijelaskan sebanyak RM340,002.72. Walau bagaimanapun, pembuat P4, dan Puan Sarojini, yang telah menyediakan angka di P6 tidak dipanggil. Oleh kerana dokumen-dokumen tersebut ditanda sebagai satu eksibit tidak bermakna dokumen-dokumen tersebut boleh diterima sehingga kandungannya terbukti. Kegagalan plaintif untuk memanggil pembuat dokumen-dokumen menyebabkan mereka tidak boleh diterima kerana ia tidak memenuhi kaedah keterangan terbaik yang diperlukan di bawah s. 73A Akta Keterangan 1950 ('AK'). Plaintif juga gagal mengemukakan sebarang keterangan yang menunjukkan bahawa pembuat P6 dan Puan Sarojini telah meninggal dunia, tidak sihat atas sebab keadaan badan atau mentalnya, di luar negara atau bahawa segala usaha untuk mencari mereka gagal untuk melepaskan mereka daripada syarat-syarat ketat s. 73A. Eksihit P6 dan P4 dengan itu dengan jelas tidak boleh diterima.

(3) Keterangan SP1 dan SP3 yang memberi keterangan bagi pihak plaintif hanya dengar cakap kerana kesahihan dokumen-dokumen, yang SP1 dan SP3 cuba buktikan, tidak boleh ditentukan tanpa pembuat-pembuat

disoal balas. Amaun RM340,002.72 tidak digambarkan dalam P4 dan selain daripada penjelasan SP1, tiada keterangan lain yang dikemukakan untuk menunjukkan asas pengiraan dan bagaimana jumlah tersebut dicapai. Plaintif telah dengan itu gagal atas imbangan keberangkalian untuk melepaskan beban untuk membuktikan tuntutannya. Oleh itu, hakim bicara telah terkhilaf dalam menerima RM340,002.72 sebagai pengiraan betul apabila tiada keterangan menyokong dapatan tersebut.

Case(s) referred to:

Chong Khee Sang v. Pang Ah Chee [1983] 1 LNS 57 HC ***(refd)***
Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
KPM Khidmat Sdn Bhd v. Tey Kim Suie [1994] 3 CLJ 1 SC ***(refd)***
Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Selvaduray v. Chinniah [1939] 1 LNS 107 ***(refd)***
Subramaniam v. PP [1956] 1 LNS 115 PC ***(refd)***
Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA ***(refd)***
Tenaga Nasional Bhd v. Kamarstone Sdn Bhd [2014] 1 CLJ 207 FC ***(foll)***
The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 73A, 101, 102
Limitation Act 1953, s. 6(1)(a)

For the appellant - Krishna Dallumah (Le Qiu Yi with him); M/s Krishna Dallumah, Manian & Indran
For the 1st respondent - Harjinder Kaur (Muhd Bakhtiar Hamdan & Lavin Vignesh with her); M/s Shahrizat Rashid & Lee

[Appeal from High Court, Seremban; Writ Summons No: 22-74-2007]

Reported by S Barathi

JUDGMENT

Alizatul Khair Osman JCA:

[1] This is an appeal by the appellant (the defendant in the court below) against the decision of the learned High Court Judge sitting in Seremban who had allowed the respondent's (the plaintiff in the court below) claim with costs.

[2] The parties in this appeal will be referred to in their original capacity in the High Court.

Background

[3] The claim of the plaintiff, Tenaga Nasional Berhad against the defendant, Sampo Materials (M) Sdn Bhd, was for the undercharged bill of electricity consumption which it alleged failed to be recorded accurately and, or correctly for the period between 20 December 2000 until 15 December 2002 amounting to the sum of RM340,002.72.

[4] *Vide* an electricity power supply agreement dated 20 June 1997 (the said agreement), the plaintiff supplied electricity to the defendant and the latter agreed to pay for the supply of electricity by the plaintiff.

[5] The total claim for the undercharged bill was due to the defect in the meter system and the reading of electricity that was supplied to the defendant.

[6] The defect was discovered when the plaintiff on 17 November 2002 at the request of the defendant for a deduction in its tariff payments, conducted an inspection at the defendant's premises. The plaintiff discovered that the meter system was not functioning properly and therefore was unable to provide an accurate reading of the electricity supplied to the defendant.

[7] After repair work on the meter system was carried out, the reading of the defendant's electricity system returned to normal and the plaintiff recalculated the supply of electricity to the defendant for the period that the consumption of electricity failed to be recorded accurately and informed the defendant accordingly.

[8] The initial calculation was from 11 December 1997 to 15 December 2002 which amounted to a sum of RM716,827.20. However, this was subsequently reduced to RM340,002.72 when the recalculation commenced from 20 December 2000 (instead of 11 December 1997) to 15 December 2002.

[9] The defendant was informed of this adjusted sum and attempts were made by both parties to resolve the matter but without success.

[10] The plaintiff then issued a notice of demand to the defendant on 23 November 2000 seeking recovery of the said sum of RM340,002.72 as undercharged bill for the period of 20 December 2000 to 18 December 2002.

[11] On 6 April 2007, the plaintiff filed the writ of summons against the defendant.

The High Court

[12] At the trial, the plaintiff produced three (3) witnesses whilst the defendant took the position that there was no case to answer on the ground that the plaintiff had failed to prove its case and did not call any witnesses.

[13] The learned judge in any event found in favour of the plaintiff and allowed the plaintiff's claim with costs.

A **The Appeal**

[14] Before us, learned counsel raised three (3) issues *viz*:

(i) whether the plaintiff's claim was barred by limitation (first issue);

(ii) whether the plaintiff had proven its claim (second issue); and

B

(iii) whether interest at the rate of 8% per annum was correctly awarded (third issue).

First Issue

C **[15]** It is not disputed that the defendant had pleaded the defence of limitation in their statement of defence. (Paragraph 8, statement of defence). It was the defendant's contention that the plaintiff's claim was filed out of time as it was filed six years and four months after the plaintiff's cause of action purportedly accrued on 20 December 2000, it is not being disputed that the writ of summons was filed only on 6 April 2007.

D **[16]** As stated earlier, the plaintiff's claim herein is for the arrears of the electricity charges due to the defendant for the electricity supplied between 20 December 2000 to 15 December 2002 which, due to the alleged tampering failed to be recorded thus resulting in the defendant being undercharged.

E **[17]** The plaintiff's claim therefore is founded on the said agreement entered into between the plaintiff and the defendant.

[18] As the plaintiff's claim is premised on the said agreement, the relevant provision governing the period of limitation in respect of such cause of action would be s. 6(1)(a) of the Limitation Act 1953. (the Limitation Act). Section F 6(1)(a) provides as follows:

> Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-
>
> (a) actions founded on contract or on tort.

G

[19] The plaintiff however contended that their cause of action accrued when the defects were first discovered on 17 November 2002 in the course of conducting an inspection of the meter. As such their claim was well within the six year limitation period prescribed in s. 6(1)(a) of the Limitation Act (*supra*), the writ having been filed on 6 April 2007. H

[20] The plaintiff's submission found favour with the learned judge who held as follows:

> Bagaimanapun saya sependapat hujah had masa ini jelas tidak bermerit. Ini adalah kerana plaintiff hanya mengetahui tentang kerosakan meter elektrik tersebut 17.11.2002, ia itu apabila SP2 telah pergi membuat pemeriksaan di premis kilang defendan. Plaintiff telah memfailkan writ pada 6.4.2007. Oleh itu plaintiff telah pun memfailkan tindakan ini dalam tempoh 6 tahun dari tarikh kerosakan tersebut diketahui. I

[21] We are, with respect, unable to agree with the learned judge.

[22] In *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* [2014] 1 CLJ 207, FC at p. 221, Jeffrey Tan FCJ citing with approval *Nasri v. Mesah* [1970] 1 LNS 85, [1971] 1 MLJ 32, and *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717 (which followed *Nasri v. Mesah*), observed as follows:

> A cause of action founded on a contract accrues on the date of its breach, and **in the case of a debt, the cause of action arises at the time when the debt could first have been recovered by action.**
>
> (emphasis added)

[23] The facts in the above case are somewhat similar to the present case. There, the appellant (TNB) sued the respondent (Kamarstone Sdn Bhd) for a sum of RM581,876.77, the amount which the appellant alleged the respondent was undercharged. This undercharge or shortfall came about as a result of the application of the wrong multiplier by the appellant when billing the respondent.

[24] The respondent had, sometime in 1996 successfully applied to the appellant for an upgrading of the electricity supply.

[25] The appellant found, in January 2003 that the respondent had been undercharged for a period of 73 months, ie, from October 1996 to October 2002. This was due entirely to the application of the wrong multiplying constant by the appellant.

[26] The Federal Court held, *inter alia*, as follows:

> Between October 1996 and October 2002 the appellant had a right, *albeit* undiscovered, to the shortfall, which was a debt due from the respondent. Except that the shortfall was discovered until year later in January 2003. Nevertheless it remained that, during the period between October 1996 and October 2002, the appellant was paid less than the sum calculated on the correct multiplier. … clearly, therefore, … **between October 1996 and October 2002, the appellant had a cause of action.**
>
> (emphasis added)

[27] It further held that the time when the shortfall could first have been recovered would have been when the shortfall was incurred which would be October 1996.

[28] In the present case, the outstanding bill was calculated from 20 December 2000 as reflected in paras. 6 and 7 of the plaintiff's statement of claim. As the outstanding bill was calculated from 20 December 2000 (although it was initially calculated from 11 December 1997) this was therefore the date when the shortfall occurred. Applying the principles set out in *Tenaga Nasional Bhd v. Kamarstone Sdn Bhd* above, it would appear that although the shortfall was discovered only on 17 November 2002 the plaintiff's cause of action would have accrued on 20 December 2000 as by

A that date the plaintiff had a right, *albeit* undiscovered, to the shortfall. In other words, by that date there was a debt due to the plaintiff. As the plaintiff's cause of action accrued on 20 December 2000, the plaintiff was clearly out of time when they filed their writ of summons on 6 April 2007.

B **[29]** Thus on this issue we agreed with the defendant that, contrary to the learned judge's finding, the plaintiff's claim was caught by limitation by virtue of s. 6(1)(a) of the Limitation Act 1953.

Second Issue

C **[30]** In respect of this issue the defendant's contention essentially was that the plaintiff had failed to prove the shortfall of RM340,002.72 allegedly due from the defendant for the period between 20 December 2000 and 15 December 2002.

D **[31]** The plaintiff's contention was based on the failure of the plaintiff to call the maker of the graph (P6) and the debit note or nota debit (P4), the two documents relied on by the plaintiff to arrive at the figure of RM340.002.72.

E **[32]** The learned judge in her grounds of judgment however, was of the view that the plaintiff had successfully proven that the amount of RM340,002,72 was the amount the defendant was undercharged for the period of 20 December 2000 until 15 December 2002. This was what the learned judge found:

> Seterusnya Mahkamah juga menerima keterangan SP1 and SP2 berkaitan jumlah RM340,002.72 tersebut sebagai jumlah pengunaan elektrik yang gagal direkodkan oleh meter elektrik dengan tepat dan betul untuk tempoh dari 20.12.2000 sehingga 15.12.2002.

F **[33]** SP1, one Puan Roselani binti Abu Zahar was the Pengurus Bisnes Daerah, TNB in Seremban at the material time. She had testified that apart from the "laporan siasatan", the plaintiff had relied on a graph which showed the electricity consumed by the defendant before and after the defect was corrected.

G **[34]** The relevant part of her evidence read as follows:

> 26. S: Pohon rujuk ke mukasurat 20 Ikatan dokumen Bersama (C). Adakah ini grafnya?
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> H J: Berdasarkan graf ini terdapat perbezaan yang dinyatakan sebelum dan selepas kerosakan diperbaiki. Bermula Ogos 97 hingga November 2002 purata pengunaan adalah serata tetapi setelah diperbaiki pada 17.11.2002 kadarnya adalah berbeza.
>
> (Mukasurat 20 Bundle C ditanda sebagai - P6).

I In cross-examination, SP1 was asked on the significance of the graph. This was her reply:

J: Untuk menunjukkan pengunaan bil elektrik Defendan. A

When questioned again "Apakah kepentingan graf ini", SP1 answered as follows:

J: Menunjukkan trending pengunaan elektrik pengguna.

[35] SP1 also confirmed in cross-examination that P6 was the basis upon which the plaintiff had issued the letters of demand on 9 January 2003 and 4 February 2003 demanding that the defendant pay the said sum of RM340,002.72. B

[36] SP1 however was not the maker of P6. When asked by learned counsel for the defendant "Siapakah yang telah membuat graf", SP1's reply was: C

Maaf. Saya tidak ingat sama ada teknikal atau pun kerani saya.

[37] The maker of P6 was never called to testify.

[38] As for the other document ie, the debit note (surat nota) relied on by the plaintiff to arrive at the allegedly outstanding sum of RM340,002.72, it was tendered in evidence by SP3. SP3, Encik Ismail bin Abd Rasid, was the accounts executive at the plaintiff's main office in Seremban at the material time. D

[39] In his evidence in chief, SP3 testified that he had confirmed the calculations contained in the debit note (marked as P4) before showing it to the defendant. E

[40] During cross-examination SP3 was asked the following questions:

S: Saya rujuk Encik kepada Ikatan D mukasurat 4 hingga 7. Saya rujuk mukasurat 4 dulu. Butir-butir seperti contohnya kita dapat banyak angka di sini 22260 x 2. Apakah butir-butir ini semua? F

J: 22260 merupakan unit yang digunakan oleh Defendan selama sebulan. Oleh kerana sebabkan kekurangan 2 *particular sebab itu saya kalikan dengan 2 dapat total unit dia, 44520.

S: Jadi dalam erti kata lain, angka di sebelah kiri adalah unit yang digunakan. Betul? G

J: Betul.

S: Boleh Encik beritahu Mahkamah siapakah yang telah membekalkan Encik dengan semua angka-angka ini? H

J: Pengiraan dibuat oleh stesyen Seremban.

S: Oleh siapa?

J: Puan Sarojini tetapi beliau dah bersara.

(*should be "dua pertiga" instead of "particular" as can be seen from Q & A4 of SP3's witness statement) I

[41] Learned counsel for the defendant argued that in respect of the graph (P6), as the maker was not called and in respect of P4 as Puan Sarojini who prepared the figures was also not called, both documents were inadmissible and SP1 and SP3's evidence in respect of these documents were merely hearsay as they were trying to establish the truth of P6 and P4, (per the Privy Council decision in *Subramaniam v. PP* [1956] 1 LNS 115; [1956] 22 MLJ 220). As the makers of these documents were not called, the makers could not be cross examined in order to ascertain the truth of their contents.

[42] Further it was submitted that merely by marking a document as an exhibit did not make it admissible as held by the Federal Court in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785, FC at p. 785.

[43] Since the makers of the graph (P6) and the author of the figures which the plaintiff relied on to calculate the outstanding sum in P4 were not called as witnesses, it was the defendant's contention that the plaintiff had failed to prove the alleged outstanding sum of RM340,002.72.

[44] The plaintiff, on the other hand, contended that the court should accept the evidence of SP1, SP2 and SP3 in relation to the computation of the sum of RM340,002.72 in the absence of any evidence from the defendant to challenge the computation of this sum.

[45] In other words as the defendant had offered no evidence to challenge the evidence of the plaintiff, *prima facie* the evidence of the plaintiff should be accepted by the court and ruled in favour of the plaintiff.

[46] The plaintiff relied on the well known authority of *Jaafar Shaari & Anor v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693 and the case of *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369, CA.

[47] In the latter case, Suriyadi Halim Omar JCA (as he then was), following *Jaafar Shaari* (*supra*) held, *inter alia* as follows:

> … It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is also that all the evidence led by the plaintiff must be assumed to be true. This proposition of law was succinctly said in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ at p. 528:
>
> > For once a defendant in civil proceedings elects not to call evidence led by the plaintiff must be assumed to be true.

[48] Whilst we do not dispute the principle laid down in *Jaafar Shaari* and *Mohd Nor Afandi* (*supra*), we agreed with learned counsel for the plaintiff that the defendant's reliance on that principle in support of their case was misconceived.

[49] Firstly, it is trite that under s. 101 and s. 102 of the Evidence Act 1950, the burden is on the plaintiff to prove its case.

[50] By way of emphasis and for ease of reference we reproduce below ss. 101 and 102 of the Evidence Act 1950:

> Burden of proof
>
> 101. (1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> On whom burden of proof lies
>
> 102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[51] The case of *Selvaduray v. Chinniah* [1939] 1 LNS 107; [1939] 8 MLJ FMSR 253 provides a classic illustration of this principle. As propounded by Terrell Ag CJ:

> The burden of proof under section 102 of the Evidence Enactment is upon the person who would fail if no evidence at all were given on either side, and accordingly the plaintiff must establish his case. **If he fails to do so, it will not avail him to turn round and say that the defendant has not established his.**
>
> (emphasis added)

[52] The plaintiff's claim turned essentially on the graph (P6) and the debit note (P4). Both these documents were in 'Part C' of the agreed bundle. They were tendered through SP1 and SP3 respectively. SP1 was not the maker of P6 whilst the figures contained in P4 was supplied by one Puan Sarojini. As established earlier through the evidence of SP1 and SP3, both the maker of P6 and that of the figures in P4 were not called to give evidence.

[53] It is settled law that the mere fact that a document is marked as an exhibit as P6 and P4 were in this case, did not render both documents admissible until the content is properly proven. This fundamental rule of evidence was comprehensively set out by Raus Sharif FCJ in *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* (*supra*).

> [36] It is fundamental that it is the requirement of the best evidence rule that the maker of a document must be called to prove it. (*Allied Bank (Malaysia) Bhd v. Yau Fiok Hua* [1998] 2 CLJ 33). Further s. 73A of the Evidence Act states that in civil proceedings, the maker must be called as a witness in order to render it admissible in evidence. (*Ooi Yoke In (f) & Anor v. Public Finance Berhad* [1993] 2 CLJ 464). And a document cannot be admitted into evidence and marked as such until properly proven. (*Chong Khee Sang v. Phang Ah Chee* [1983] 1 LNS 57). In the instant case, it is clear that both the subcontract and the fax were not properly proven

A and should have been disregarded. Thus, the Court of Appeal, by relying on those documents in reversing the findings of facts of the trial judge was clearly in error on evidential issues.

[54] In his judgment, Raus Sharif FCJ cited with approval the case of *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57; [1984] 1 MLJ 377 where B Shankar J (as he then was) ruled, *inter alia*, that:

(1) a document does not become admissible in evidence merely because it has been handed to the adjudicating officer and marked as an exhibit; and

C (2) a document cannot be admitted into evidence and marked as such until it has been properly proved.

[55] In respect of P4 which contained the calculations upon which the alleged outstanding sum was arrived at, the figures upon which SP3 based his calculation were prepared by one Puan Sarojini. (see the evidence of SP3 in cross-examination (*supra*)).

D

[56] Puan Sarojini who had retired by the time the trial took place, was never called to give evidence. The figures supplied by Puan Sarojini were allegedly the amount of units consumed by the defendant in one month.

[57] SP3 could not explain how the figures were arrived at and what E formula was used as a basis for the calculation of the figures. This can be seen when SP3 was challenged as to the accuracy of the figures during cross-examination:

S: … Saya cadangkan pengiraan-pengiraan yang dibuat oleh Puan Sarojini adalah tidak betul. Setuju atau tidak? Saya cadangkan pada F Encik Ismail pengiraan-pengiraan yang telah pun dibuat oleh Puan Sarojini berkenaan dengan unit yang digunakan adalah tidak betul dan tidak tepat. Setuju atau tidak?

J: Tidak setuju.

G **[58]** As for P4, SP1 had confirmed in her evidence that she was not the maker of the document. SP1 testified that P4 was drawn up to show the consumption of electricity by the defendant before and after the meter was repaired. In Q&A 26 of her witness statement, SP1 explained the significance of P4 in the following terms:

H J: Ya. Berdasarkan graf ini terdapat perbezaan yang dinyatakan sebelum dan selepas kerosakan diperbaiki. Bermula Ogos 97 hingga November 2002 purata penggunaan adalah serata tetapi setelah dibaiki pada 17.11.2002 kadarnya adalah berbeza.

[59] SP1 had also stated in cross-examination that P4 was the basis upon I which the notice of demand were sent to the defendant on 9 January 2003 and on 4 February 2003.

[60] It can be seen from the above that the plaintiff's claim was hinged primarily on both these documents P4 and P6.

[61] As testified by SP1 and SP3, it was from these documents that the outstanding sum of RM340.002.72 was arrived at.

[62] However, the maker of P4 and Puan Sarojini who prepared the figures in P6 were not called.

[63] In our view the failure of the plaintiff to call the makers of these documents rendered them inadmissible as they had not fulfilled the best evidence rule required under s. 73A of the Evidence Act 1950. (see *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* (*supra*). The fact that they were marked as exhibits would not make them admissible until their content had been properly proved. (as per Shankar J in *Chong Khee Seng* (*supra*)).

[64] The plaintiff in this regard failed to adduce any evidence to show that the maker of P6 and Puan Sarojini were dead, unfit by reason of their bodily or mental condition, were overseas or that all efforts to find them have been made without success in order to absolve them from the strict requirements of s. 73A of the Evidence Act 1950.

[65] The plaintiff had contended that it was not necessary for the maker to be called. According to learned counsel for the plaintiff, the computation and calculation of the amount outstanding was based on a machine graph ie, P6. Therefore, the evidence of SP1, SP2 and SP3 in reading the calculation on the graph was sufficient to negate any adverse inference that may be invoked against the plaintiff for not calling the maker in contrast to the defendant who had chosen not to adduce any evidence to dispute the said outstanding sum.

[66] We were unable to agree with learned counsel's proposition for the reasons stated above. In this regard we refer to the case of *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 3 CLJ 1; [1994] 2 MLJ 627 at p. 633 where Mohamed Dzaiddin SCJ (as he then was) set out the legal position on this issue in clear and lucid terms. In this case the respondent sued the appellant for the recovery of the sum of RM1,581,870.90 together with interest and costs, which the respondent claimed was the sum due to him for works done under certain agreements. The respondent testified that after completing the works under the agreements he submitted his claims by way of summary of accounts prepared by one, Ah Lian, a clerk. During the trial, the respondent relied on the said summary of accounts to support his claim. Although the summary of accounts were taken from the respondent's own record book which was the actual work completed by him, the respondent was unable to produce the book in court. Ah Lian the maker of the summary of accounts was also not called as a witness.

[67] We reproduce below *in extenso* the judgment of His Lordship on this issue:

> We agree with counsel's submission that the **learned judicial commissioner was wrong in law in relying on the summary of accounts** (at pp 117-121 of the appeal record) **prepared by Ah Lian, who was not called as a witness nor made available to the defendant.** Moreover, the record book of the respondent, which was the source document upon which the summary of accounts was prepared, was never produced. It is a well-established rule of evidence that when documentary evidence is tendered, primary evidence of the said document must be adduced except in the cases under s 65 of the Evidence Act 1950. According to *Sarkar on Evidence* (14th Ed, 1993) at p 961, when a given matter has been expressed in writing, the primary evidence of it is the writing itself and subject to the provision of s 65, the writing, unless admitted by the other side, must be produced if it is desired to prove the matter expressed in it. *On the question of a balance sheet, the Indian Supreme Court, in Petlad Turkey Red Dye Works Ltd v. Dyes & Chemical Workers' Union, Petlad & Anor, has held that a balance sheet does not by itself prove the facts stated therein. It has to be proved like any other fact by affidavit or otherwise.* Das Gupta J, delivering the judgment of the court, stated (at p 909):
>
> > All that the balance sheet, as submitted, shows is that certain statements were made. The mere fact that the statements were made can never be taken as proving that the statements were correct.
> >
> > That is a distinction which the courts of law have always been careful to make. Thus, if a person is to prove that he was ill on a particular date, the mere filing of a certificate of a medical man that he was ill on that date is not accepted as evidence to show that he was ill. The correctness of the statement made in the certificate has to be proved by an affidavit or oral testimony in court by the doctor concerned or by some other evidence. There is no reason why an exception should be made in the case of balance sheets prepared by companies for themselves. It has to be borne in mind that in many cases the directors of the companies may feel inclined to make incorrect statements in these balance sheets for ulterior purposes. While that is no reason to suspect every statement made in these balance sheets, the position is clear that we cannot presume the statements made therein to be always correct. **The burden is on the party who asserts a statement to be correct to prove the same by relevant and acceptable evidence.**
>
> **Likewise, in the instant case, the summary of accounts does not prove the facts and particulars stated therein.** The mere fact that the summary of the particulars were made could never be taken as proving that the contents were correct. **It has to be proved by calling the maker to explain the facts and the basis of the calculation of the amount claimed.** Moreover, the record book upon which the maker based her summary must be in evidence. In this case, where the summary was based on the record kept by the respondent, such record must be produced except if it

can be shown that the original record is lost or has been destroyed. The burden of proving that the record book is lost or destroyed lies on the party who is seeking to adduce secondary evidence of the contents of the record book. (See s 104 illustration (b) of the Evidence Act 1950). Here, the evidence of the respondent on the matter is as follows (at p 56 of the appeal record):

(emphasis added)

[68] Thus similarly in the present case, the calculations contained in the debit note, P4 in particular does not prove the facts and particulars contained therein. As observed by the Supreme Court, the mere fact that the calculations were made could never be taken as proving that the contents were correct. It has to be proved by calling the maker, in this case Puan Sarojini who prepared the figures upon which SP3 relied on to extrapolate the amount due to the plaintiff, to explain the figures and the basis of the calculation. The explanation provided by SP3 in examination in chief and in cross-examination in relation to P4 illustrates this point clearly:

4. S: Di dalam kes-kes yang berkaitan tuntutan terkurang bil atau bil yang gagal untuk direkodkan boleh Encik terangkan?

J: Setelah kerosakan pada sistem bacaan atau sukatan arus diperbetulkan satu pengiraan semula jumlah kuasa lektrik yang telah diguna yang gagal untuk direkodkan akan dibuat penyelarasan semula. Kebiasaannya ianya dicajkan kurang (dua pertiga). Setelah pengiraan semula dibuat butirannya akan diserahkan dan dimaklumkan kepada pengguna bagi pihak-pihak untuk membuat perbincangan penyelesaian … Butiran pengiraan tersebut diperolehi dari sistem Plaintif dan saya akan menyemak serta mengesahkan butirannya sebelum diserahkan kepada pelanggan …

S: Saya rujuk Encik kepada Ikatan D mukasurat 4 hingga 7. Saya rujuk mukasurat 4 dulu. Butir-butir seperti contohnya kita dapat banyak angka di sini 22260 x 2. Apakah butir-butir ini semua?

J: **22260 merupakan unit yang digunakan oleh Defendan selama sebulan. Oleh kerana sebabkan kekurangan 2 particular (dua pertiga) sebab itu saya kalikan dengan 2 dapat total unit dia, 44520.**

S: Jadi dalam erti kata lain, **angka di sebelah kiri adalah unit yang digunakan. Betul?**

J: Betul.

S: Boleh Encik beritahu Mahkamah **siapakah yang telah membekalkan Encik dengan semua angka-angka ini?**

J: Pengiraan dibuat oleh stesyen Seremban

S: Oleh siapa?

J: **Puan Sarojini tetapi beliau dah bersara.**

(emphasis added)

[69] In the premises P6 and P4 were therefore clearly inadmissible and SP1 and SP3's evidence merely hearsay as the veracity of these documents which SP1 and SP3 were seeking to establish could not be ascertained without the makers being cross-examined. (see *Subramaniam v. PP* (*supra*)).

[70] It is worth noting that the said amount of RM340,002.72 is not even reflected in P4, the document relied on by the plaintiff to support its claim. The only evidence to show how this amount was arrived at was from SP1 who, when asked why the figure of RM716,827.28 was reduced to RM340,002.72 said:

> S: Kenapa ada perbezaan?
>
> J: Ini adalah kerana bila tindakan mula dibuat ke atas Defendan pada 23.11.2006 jumlah yang boleh dituntut adalah sebanyak RM340,002.72 sahaja mengikut apa yang dibenarkan oleh undang-undang.

[71] Aside from the explanation by SP1 (*supra*), no evidence was adduced to show the basis of the calculations and how the sum of RM340,002.72 was arrived at.

[72] The learned judge, with respect was therefore plainly wrong in accepting the RM340,002.72 as the correct calculation when there was no evidence to support such a finding.

[73] In the light of the above we were of the view that the learned judge erred in concluding that the plaintiff had successfully proven that the amount of RM340,002.72 was the amount undercharged by the plaintiff for the electricity consumed by the defendant between the period of 20 December 2000 until 15 December 2002, when the evidential requisites of P4 and P6 were clearly wanting.

[74] For the reasons stated above we could not but agree with the defendant that the plaintiff had failed on a balance of probabilities to discharge its burden of proving its claim. Until and unless the legal and evidentiary burden of proving its claim is discharged, the burden does not shift to the defendant to prove its defence, no matter how weak the defence might be (per Lim Yee Lan JCA in *Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd* [2014] 4 CLJ 323). As such the plaintiff's assertion that the court should accept the evidence of the plaintiff's witnesses as true and its claim proved in view of the defendant's failure to lead any evidence to rebut or challenge the plaintiff's evidence, was clearly unsustainable. (see ss. 101, 102 of the Evidence Act 1950 and *Selvaduray v. Chinniah* (*supra*)).

[75] As opined by Mohamed Dzaiddin SCJ in *KPM Khidmat Sdn Bhd* (*supra*):

> Looking at the matter as a whole, we have come to the conclusion that the learned judicial commissioner was wrong in relying on the summary of accounts (at pp 117 - 121 of the appeal record) as sufficient proof of

the debt due to the respondent bearing in mind that the burden of proof always lies on the respondent to prove his claim. We hasten to add that since the summary of accounts is inadmissible for reasons which we have adverted to above, it is our further conclusion that as there is no documentary evidence before the court which the respondent can rely to substantiate his claim, his case against the appellant must accordingly fail.

Third Issue

[76] This issue concerns the rate of interest awarded by the court. The learned judge had awarded interest at the rate of 8% per annum on the judgment sum.

[77] Encik K Dallumah, counsel for the defendant conceded that this was an oversight by all parties as at the date of the decision on 20 August 2011 the amendment to the Rules of the High Court 2011 whereby the rate of interest was reduced from 8% to 4% per annum was already in force. As such counsel prayed that the rate of interest awarded be amended accordingly in the event that the learned judge's decision is affirmed.

Conclusion

[78] In the light of our findings above we were of the unanimous view that the appeal should be allowed and we made the order accordingly. We set aside the learned judge's decision and awarded costs of RM25,000 to the appellant, and further ordered that the deposit be refunded to the defendant.